

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JUSTIN J. ERBACHER,

No. 1:23-cv-01194-JLT-BAM (PC)

Plaintiff,

**ORDER REFUSING TO ADOPT THE
FINDINGS AND RECOMMENDATIONS
AND FINDING A CONGNIZABLE FOURTH
AND EIGHTH AMENDMENT CLAIM
(Doc. 12)**

ROBLES,

Defendants.

Justin J. Erbacher is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. The assigned Magistrate Judge screened the first amended complaint and issued findings and recommendations, which concluded that the action should be dismissed with prejudice for failure to state a cognizable claim upon which relief may be granted. (Doc. 12.) Plaintiff filed objections. (Doc. 15.)

In her objections, the plaintiff reiterates that the officer's conduct in strip searching her was due to her transgender status. (Doc. 15 at 1 -2) She alleged that the officer allowed some inmates to enter the "Work Change" area without searching them, but that the officer required that the plaintiff and other inmates in the immediate area to be searched. (Doc. 11 at 7-8) These other inmates were required to remove their shirts. *Id.* However, despite plaintiff presenting her "transgender card" and reporting that her "search preference chrono" had been approved, which allowed her to be searched by female officers, the officer required the plaintiff to remove her

1 clothing and to “squat and cough” to determine whether she had items secreted in her body. *Id.* at
2 7-8. None of the other inmates who were cisgender, were required to display their genitals or to
3 perform the “cough and squat.” *Id.*

4 As correctly noted by the findings and recommendations, the Fourth Amendment does not
5 prohibit a cross-gender unclothed body search as described here. (Doc. 12 at 8-9) However, the
6 Ninth Circuit has adopted the four-factor balancing articulated in *Bell v. Wolfish* 441 U.S. 520,
7 559 (1979) to determine whether the Fourth Amendment is violated by a body search. *Byrd v.*
8 *Maricopa County Sheriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011).

9 Though the officer did not touch the plaintiff, he made her remove all of her clothing
10 including her underwear and while nude, to squat and cough. (Doc. 11 at 8) The search occurred
11 within the view of two other male officers who were present in the office where the search
12 occurred. *Id.* The officer also commented on the plaintiff’s breasts, by indicating, “Those things
13 on your chest don’t make you special.” *Id.* The allegations demonstrate that the search was not an
14 emergency and there was no particular need to conduct it. Finally, the officer required the nude
15 search despite being apprised that the plaintiff had been approved for search by female officers
16 and without checking whether there was a female officer available *Id.*

17 Considering these allegations, the Court concludes that the significant intrusion into the
18 plaintiff’s personal rights and her desire to “shield one’s unclothed figure from [the] view of
19 strangers, and particularly strangers of the opposite sex . . .” (*Byrd* at 1141) when weighed against
20 the lack of justification for the search, states a claim under the Fourth Amendment. Though this
21 search occurred only on one occasion, this is not the type of incidental or casual observation
22 anticipated in *Grummett v. Rushen*, 779 F.2d 491, 494 (9th Cir. 1985). The allegation that the
23 senior officer present at the search found that it was unnecessary for the plaintiff to remove her
24 undergarments supports this conclusion.

25 As to the sexual harassment claim brought under the Eighth Amendment, the complaint
26 does not allege that the officer touched the plaintiff or made any sexually charged comments,
27 except to note that her breasts did not “make her special.” Though this comment could be
28 interpreted different ways, mere verbal harassment alone, in general, does not state a claim under

1 the Eighth Amendment. *Schwenk v. Hartford*, 204 F.3d 1187, 1198 (9th Cir.2000). However, this
2 case involves more than a claim of verbal harassment, as described above. Forcing the plaintiff to
3 strip nude and to position herself in a degrading manner without any showing or penological
4 need, at this stage, appears to state a claim for sexual harassment. Thus, because the salient
5 allegations made in the first amended complaint as recited above, arguably demonstrate sexual
6 harassment under the Eighth Amendment, the Court finds that the plaintiff has stated a cognizable
7 claim.

8 According to 28 U.S.C. § 636(b)(1)(C), this Court has conducted a *de novo* review of this
9 case. Having carefully reviewed the entire file, including Plaintiff's objections, the Court

10 **ORDERS:**

11 1. The findings and recommendations issued on November 7, 2023, (Doc. 12), are not
12 adopted;

13 2. This action may proceed against Correctional Officer Robles under the Fourth
14 Amendment on the claim he conducted an unreasonable search of the plaintiff and on
15 the claim that he subjected her to sexual harassment as prohibited by the Eighth
16 Amendment.

17 3. The matter is referred to the Magistrate Judge including for all permissible purposes,
18 including issuing the order for service of process.

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20 IT IS SO ORDERED.

21 Dated: December 27, 2023


UNITED STATES DISTRICT JUDGE

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